

# The EU and human rights: an unlikely evolution

by Paul Kearns

The author considers the problems associated with the regulation of human rights in EU law and the desirability or otherwise of a binding EU Charter of Fundamental Rights.

## INTRODUCTION

The European Union was not designed to be a human rights organisation and yet, with the emergence of an EU Charter of Fundamental Rights (hereinafter referred to as the Charter), that has already acquired some legal effect despite not being binding, the EU has now committed itself unqualifiedly to being a staunch defender of human rights. One preliminary question is whether this development is desirable. Why *should* the EU protect human rights? Why not leave that to the Member States? *A fortiori*, why not be content to let a specialist body like the Council of Europe protect human rights under its specifically-designed European Convention on Human Rights? Such issues are policy matters and what is lamentable is that in relation to human rights the EU has never had a constructive, overarching human rights policy. As a result of this, the regulation of human rights has been an incremental, usually *ad hoc* process in the EU until very recent times. What in fact occurred historically is that human rights elements started appearing in the case law of the European Court of Justice (ECJ) and something practical had to be done about the situation. This incremental judicial development was not conducive to the creation of an overall EU policy on human rights and partly explains why few questioned the regulation of human rights in the EU as a matter of principle. However, there are arguments for and against the EU's belated involvement in human rights.

First, it is important for the ECJ to consider individuals' more general concerns as well as purely economic matters when the court is confronted by such issues in a given case. Moreover, the EU is a significant political actor in the world and there is an expectation that it will concern itself with human rights. Dealing with human rights also gives the EU a certain ethical foundation, and a tier of human rights adjudication within the ECJ would emphasise the EU's concern for the observance of human rights norms. The EU must also keep up with the development of human rights in its Member States and is in a position to unify and harmonise their separate human rights policies. The EU

can monitor the Member States' human rights records, and such EU vigilance can act as a catalyst for the remedying of any national lack of initiative or success in this realm.

In addition, it is arguable that the EU is in a more objective position to regulate human rights than is sometimes found in individual national states with their varying subjective policies. This EU position is also a usefully superior position, and the EU can act as an instructive and dominant guide for the Member States in the human rights field. A technical reason for the EU's necessary involvement in human rights is the presence of criminal justice monitoring under the Third Pillar which *requires* the EU to follow a certain human rights course. The enlargement of the EU has required the EU to survey human rights policies and actions in the new Member States. If necessary, a state can be refused admission to the Union on account of its poor human rights performance, and the EU can punish Member States for any national human rights violations by, *inter alia*, ceasing to trade with them. Some commentators opine that having the EU in charge of human rights is undemocratic because in the Member States the type of voting is preferable in being more democratic, but others contend that such an appeal for subsidiarity is misjudged because the EU can protect minorities better than under a national majority-dictating voting mechanism, and human rights tend to involve minorities.

## HISTORY AND IMPROVEMENT

In view of the above considerations, we might wonder why human rights protection was not a goal of the EU from its very start. As is well known, the EU began as a totally economically-oriented body of six states concerned with primarily coal and steel, and the enhancement of their trade in these areas. It was only very gradually that the EU moved towards political initiatives as well as economic ones, having made changes from the EEC to the EC to the EU. At its inception, therefore, the organisation did not have reason to believe that it would need to involve itself with human rights issues. Moreover, the Council of Europe

in Strasbourg was specifically developed to regulate human rights in the contracting states of the European Convention on Human Rights (hereinafter referred to as the Convention) so it was not self-evident that the EU would begin replicating this remit itself (all the EU states are now party to the Convention). The debate continues as to whether we really need two parallel human rights jurisdictions in Europe. Another reason why human rights did not feature as an EU concern at its beginning is that the founding states were disorientated after World War II and did not wish to give up significant power to an international body such as the EU. Human rights, moreover, are now a highly topical concern, but that was not the case in 1945, when the Universal Declaration of Human Rights had not even been born.

Nevertheless, there began to appear foundations for the development of an EU human rights involvement. The EU became concerned about discrimination, with the establishment, for example, of “equal pay for equal work”, so its anti-discrimination initiatives were, in principle, close subject-wise to the notion of human rights. The EU, moreover, was relatively quick to develop a human rights aspect to its external policy, and this had a knock-on effect for its internal policy. The EU institutions, such as the European Parliament, developed human rights roles; together with the European Council, the Parliament still monitors contemporary human rights issues. One drawback for the founding of an EU human rights approach was the lack of an holistic policy on human rights, and the lack of a doctrine of precedent in the ECJ led to contradictory decisions on human rights. On a practical level, the ECJ’s judges were ill-equipped to adjudicate human rights cases, not least from a lack of expertise in this field. The Commission was also too bureaucratic and ponderous to monitor human rights matters quickly and efficiently. The EU also took its time in regulating its own institutions human rights-wise.

So, the lack of an overall human rights policy accepted, what could the EU do in other respects to enhance its human rights profile? A body to hone and better co-ordinate the beginnings of such a human rights policy would improve the situation. Some also suggest accession to the Convention but this is still a controversial matter to do with EU competence or power. The judges of the ECJ could be trained to deal with human rights law more efficiently. The ECJ could also benefit from a specific document to guide it, together with an initiative to process human rights as a higher plateau of judicial concern. Doctrines could be built up in the court more meticulously by instituting a doctrine of binding precedent, thus avoiding contradictory human rights judgments and *obiter* pronouncements. Member States could become more co-operative and more answerable to the EU for their human rights infringements; they could also increase EU funds for human rights developments. Greater support could be given to the EU Charter, to either separate it from other

constitutional documentation that could founder, or to make all or some of such documentation that includes it binding. A step could be taken to open up for further discussion the disjunction between the Convention jurisdiction based exclusively on human rights and the EU parameters of human rights protection. How the Charter affects such a problematic should also be clearly and cogently ascertained. At the moment, the suspension of the EU’s constitutional plans radically inhibits the evolution of a human rights plan or timetable for human rights development by the EU.

## THE CHARTER

The Charter is now incorporated in the Lisbon Treaty following the demise of the original draft constitutional treaty so the EU appears to be continuing to galvanise and extend its human rights interests. Contrary to popular belief, the concept of such a charter in EU law is not new. In the 1950s, a charter to replicate the Convention was envisaged but no treaty development occurred because of the EU’s preoccupation with its economic targets. It was only after the case of *Stauder*, *Case 29/69 Stauder v City of Ulm* [1969] ECR 419, that human rights formally became recognised as part of EU law. In that case, it was judicially stated that fundamental human rights were enshrined in the general principles of EC/EU law. The implication was that this was where human rights had always been lodged as a legal category. Subsequently, a human rights doctrine of sorts was constructed by the ECJ following a series of relevant cases but this was a hazy theme full of contradictions and complexities reflective of the ECJ’s lack of knowledge when dealing with human rights law. It is arguable that this relative ineptitude was another spur for the development of a clear and coherent statement of the rights protected by EU law in the form of a charter.

There are various theories as to why the *Stauder* development took place: one idea is that the notion of human rights was forged in the ECJ’s case law as part of a remit to counteract Germany’s questioning of the supremacy of EC/EU law. It has also even been suggested that human rights were artificially designed into the EU legal order as an attempt to weaken democracy, which is rather far-fetched. A creditable observation, though, is that, even when the EU was habituating itself to its political ambitions, it nevertheless retained a bias towards the protection of “market rights”, indicating perhaps that the espousal of human rights ideals was simply camouflage beneath which to further strengthen its commercial goals, with which it is more centrally associated. This argument is undermined, though, by the presence of the Charter now in the second part of the extant but unratified constitutional Lisbon treaty, as the commitment to such a charter indicates human rights priorities in general as an EU concern. One interpretation of the presence of this Charter in a constitutionally-relevant document is that a covert EU intention is extremely political, and futuristic

i.e. that the Charter become a bill of rights in a new federal state of Europe founded on the EU. This notion is one mainly adhered to by radical Eurosceptics but it is certainly true that the EU has developed in leaps and bounds regarding its political, as opposed to merely economic, ambitions, and further EU political cohesion is virtually inevitable.

## THE CHARTER AND THE CONVENTION

If the Charter becomes binding following the proposed but unlikely ratification of the Lisbon Treaty, it will establish a human rights legal order that will parallel that of the Convention. This raises a number of interesting questions. First, since a common opinion is that the Convention has been an extremely successful regional international human rights instrument, can the Charter really compete with it or will it be practically redundant? How will decisions be made by solicitors advising their clients about *both* human rights routes to justice? If the client's problem is economic, will he/she be advised to take the Charter route? Moreover, if similar litigation results in involvement with both the European Court of Justice and the European Court of Human Rights, which decision/precedent should prevail? It is commonly assumed that the EU court will always defer to the authority of the Strasbourg court but can this be guaranteed, and what could be the consequences if not? A confusion and contradiction of rights priorities and values across Europe? It is true that the Strasbourg court is a victim of its own success in that it is vastly over-burdened by cases, so the presence of another European human rights court might alleviate such a burden, but what if that other court is lamentably substantially less specialised, and therefore ineluctably less adept at human rights regulation? What if that other court itself is over-burdened as the EU court indubitably is? Would European citizens experience great delays and, more importantly, great variance in the quality of legal process afforded them? The EU court has often been criticised for exaggerating its jurisdiction and imposing uniform rules on Member States: should this be extended further to the realm of human rights? What will become of subsidiarity in the EU and the margin of appreciation in the Convention system? Will the presence of two substantial human rights courts in Europe render local decision-making more subsidiary, and negotiated more dismissively and expediently, in the legal knowledge that, given the increase in appeals, the important decision-making will ultimately lie in one or other international court? The EU court is, moreover, composed of a judiciary that is unelected and unaccountable. That state of affairs rests uncomfortably with the Strasbourg position which ensures that each judicial candidate is evaluated thoroughly.

There are also more questions to be asked of the EU if it embarks on adopting a more cardinal human rights profile. Unlike most other human rights regimes, it will

retain at least an aspect of its economic focus, even though some commentators think its economic activity is virtually exhausted, a view with which this author disagrees. The EU will still be a hybrid body because of its economic origins and, for a human rights institution, this is unusual, and could be debilitating as far as resources are concerned. Moreover, under the Strasbourg system, a right-holder is seen as an individual *per se*, and this idea is clearly divorced from the notion of citizenship. The EU model is very different. Freedom of movement, and other EU-based freedoms, are firmly attached to the idea of EU citizenship, and Member States breach citizens' rights, which are binding on those states, only when implementing or acting upon EU law. This point emphasises again the unforeseen human rights position of the EU, which fits uneasily with more traditional human rights approaches in more mono-dimensional institutions such as the Council of Europe. The EU human rights mandate, moreover, cannot expand the substantive content of human rights in the EU because the EU has limited competence to enact rules on human rights and were there not such a limitation leading Member States might refuse to ratify the Lisbon Treaty.

Member States of the EU have a tendency to enjoy all the economic benefits the EU provides but to resist, or even resent, significant political consequences of their EU membership, whether or not they are connected with economic advantages. This prevailing attitude is probably why the Charter originally, at the draft stage in Nice in 2000, did not include the rights of minorities, which is a substantial and surprising omission for a comprehensive human rights instrument.

Finally, in the Charter there is an accession clause facilitating accession to the Convention. Should such accession take place, the institutions of the EU would be subject to review by the Strasbourg court and, as a direct consequence, the EU would be unable to be the final arbiter on the legality of EU law. This would make the enforcement of the Charter's provisions subject to the approval of the Strasbourg court. A hierarchy would then be established that would involve much repetition of rights enforcement. Apart from Strasbourg adjudication on a few innovative provisions in the Charter, the review of Charter rights by the Strasbourg court would be a mundane, repetitive, and resource-wasting operation. A realist or cynic might say that such lamentable circumstances would not have arisen had the EU not embarked on an impromptu dealing with human rights in the first place. 本

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